(4)
Supreme Court, U.S.
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No. 93-1814

In The

# Supreme Court of the United States

October Term, 1993

TANIA FLORES DE BRENES individually, and as Executor, Administrator, or Personal Representative of the Estate of Eric Antonio Brenes, decedent; and CLAUDIA CROW, individually and as Executor, Administrator, or Personal Representative of the Estate of ALFONSO G. WONG-VALLE and MARIA WONG-VALLE, decedents,

*Petitioners,*

vs.

TRANSPORTES AEREOS NACIONIALES, S.A., a foreign corporation, and SERVICIO AEREO DE HONDURAS, S.A., a foreign corporation,

*Respondents.*

**On Petition For Writ Of Certiorari To The District Court of Appeal Of Florida, Third District**

## REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT IN REPLY

### 1. The federal questions were properly preserved for review in this Court.

The defendants' primary contention is an effort to finesse the substance of our petition with a procedural argument. They contend that the federal questions we have asked the Court to entertain were not properly preserved for review. We disagree with this contention. Because of the different dates of the critical documents upon which we have relied – the Nicaraguan Supreme Court's advisory opinion and the Nicaraguan National Assembly's "Authentic Interpretation," Law No. 157 – a two-part analysis is required.[1]

With respect to the Supreme Court's advisory opinion, which was rendered after filing of the defendants' initial brief and prior to the filing of our answer brief in the court of appeal, we note that the defendants explicitly invoked the due process clause of the Fourteenth Amendment in the trial court; the trial court explicitly ruled that its determination of Nicaraguan law in the plaintiffs' favor was consistent with the due process rights of the parties; and the defendants explicitly invoked the due process clause in their initial brief in the court of appeal (R. 518-56, 642; appellants' brief, p. 22). Because the defendants were certainly correct that the due process clause required that the result in the case not contradict the "clearly established law" of Nicaragua, we did not challenge this constitutional premise; instead, we accepted it as a constitutional constraint upon the court of appeal's power

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[1] Before we begin that analysis, however, a brief observation is in order concerning the defendants' apparent complaint that these acts of state were procured by the "lobbying efforts" of persons sympathetic to the plaintiffs. This is not a challenge to the authenticity or validity of the acts or to the legality or regularity of the political processes by which they were obtained. It is simply an expression of "sour grapes." These governmental institutions were at all times equally accessible to the defendants, and the only reason that they aligned themselves with the plaintiffs' position is simply that Nicaraguan law allows the recovery of moral damages in these cases.

to resolve the legal question before it, and argued that the "clearly established law" of Nicaragua was precisely what the Supreme Court's advisory opinion said it was.

The decisions relied upon by the defendants for their "raise it in the trial court or waive it" argument hold only that an issue which could have been raised in the trial court, but was not, cannot be argued for the first time on appeal. They do *not* hold that reliance upon a constitutional provision actually raised in the trial court by one party and agreed to by the other party cannot be argued on appeal by the party who agreed with its applicability when it was raised. Once an issue has been raised in the trial court by any party, it is an issue in the proceeding and can properly be argued by either party on appeal. And, of course, once the issue has been raised by one party on appeal and agreed to by the other, the issue is squarely before the court of appeal.

Moreover, when, as here, the issue could not have been raised in the trial court because it arises out of a development which occurs during the pendency of the appeal, it can properly be raised during the appeal. *See City of Miami v. Harris*, 490 So.2d 69 (Fla. 3d DCA 1986) (where United States Supreme Court rendered decision overruling prior precedent while motion for rehearing was pending, court of appeal was required to withdraw its initial decision affirming judgment, grant rehearing, and reverse judgment), *cert. denied*, 479 U.S. 1031 (1987), and the additional decisions cited at page 10 of our petition. We therefore believe that our position here, that the court of appeal violated the plaintiffs' due process rights in failing to follow the "clearly established law" set forth in the Nicaraguan Supreme Court's advisory opinion, was properly preserved for review here.

In any event, after the court of appeal filed its decision and before the decision became final, the Nicaraguan National Assembly enacted Law No. 157. Because that event postdated the decision, our *only* opportunity to bring it to the court of appeal's attention was in a motion for rehearing. And in our motions for rehearing, we explicitly asserted that the due process clause of the Fourteenth Amendment required the court of appeal to follow the "clearly established law" of

Nicaragua, as interpreted and stated by Law No. 157 (App. 22a-25a, 44a-45a, 57a-58a). We also explicitly asserted that settled principles of the doctrine of international comity required the same result; and we relied squarely upon this Court's decision in *Hilton v. Guyot*, 159 U.S. 113 (1895), for that position – not merely upon Florida decisions (which follow *Hilton* in any event), as the defendants contend (App. 49a-57a, 50a).[2] As we noted in our petition, because the court of appeal's decision was not yet final at the time our motions for rehearing were filed, it was permissible to raise this post-decision development by motion for rehearing, and the court of appeal was required to entertain it. *See City of Miami v. Harris, supra.*

A federal question *is* properly preserved for review in this Court when raised in a motion for rehearing, where, as it was here, the question is created by a post-decision development and the litigant's first opportunity to present the question is in a motion for rehearing – or where the state court is, as it was here, required to entertain it, notwithstanding that

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[2] The defendants contend that the act of state doctrine derives exclusively from the doctrine of "domestic separation of powers," and not from general principles of the doctrine of international comity – and that our invocation of the doctrine of international comity was therefore insufficient to invoke the act of state doctrine below. We disagree. The act of state doctrine clearly derives from both doctrines. *See Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990). And reliance upon the whole of the doctrine of international comity was clearly reliance upon all of its parts, including the act of state doctrine. *See Taylor v. Illinois*, 484 U.S. 400 (1988).

The defendants also contend that the act of state doctrine was not violated by the court of appeal, because it did not pass upon the validity of any act of the Nicaraguan government. We disagree. Most respectfully, the court of appeal's refusal to honor the valid enactment of Law No. 157, which was plainly designed to inform it that its interpretation of Nicaraguan law was erroneous and had to be corrected, utterly flouted that perfectly valid act – and its refusal to respect that authoritative act in the very case which it was designed to correct clearly amounted to a violation of the act of state doctrine.

the motion for rehearing is summarily denied without reference to the federal question. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930); *Saunders v. Shaw*, 244 U.S. 317 (1917); *Cole v. Arkansas*, 333 U.S. 196 (1948). We therefore believe that our positions here, that the court of appeal violated the plaintiffs' due process rights and the principle of international comity known as the act of state doctrine in failing to respect Law No. 157, were properly preserved for review here. Any other conclusion, we respectfully submit, would mean that no post-decision, pre-finality development creating a federal question properly brought to the lower court's attention at first opportunity could ever be the subject of review by this Court – and that is plainly not the law.

**2. Law No. 157 was a permissible interpretation of existing law, not an impermissible *ex post facto* law.**

Next, the defendants squarely concede that the court of appeal's decision flatly contradicts the Nicaraguan National Assembly's "Authentic Interpretation," Law No. 157, but they argue that the court of appeal could properly have ignored it because it was an impermissible *ex post facto* law. We disagree with this contention as well. As the defendants themselves point out, "Article 138(2) of the Nicaraguan Constitution of 1987 . . . vests in the Nicaraguan National Assembly the power to 'officially interpret the law'," while the same Constitution provides in Article 38 that "[t]he law does not have retroactive effect . . . " (Brief in Opposition, pp. 7, 10). Because both of these provisions exist in the same Constitution, they obviously must be read *in pari materia* and each given effect. That reconciliation is found in the perfectly sensible language of Section II, Article IV of the Preliminary Title to the Nicaraguan Civil Code, which reads as follows:

> The law may provide only for the future and shall never have a retroactive effect.

> However, laws which are limited to interpreting the meaning of other laws shall be understood as incorporated into such laws; but said laws shall not affect in any manner whatsoever judicial decisions which are final in the time in between.

Indeed, if Article 38 were read as broadly as the defendants would have the Court read it here, to prevent application of an Interpretative Law to a pending controversy, then the power to "officially interpret the law" given by Article 138(2) would be rendered meaningless. Surely the two provisions must be harmonized, as they have been by the provision of the Civil Code quoted above; and, of course, for this Court to accept the defendants' construction of Article 38, it would have to declare this provision unconstitutional under Nicaraguan law – which would itself be a violation of the act of state doctrine.

Most respectfully, even a cursory reading of Law No. 157 should convince this Court that it is not a new law. It creates no new Articles in any of Nicaragua's existing Codes; it adds no words to any existing Code provisions; and it deletes no words from any existing Code provisions. It is, by its own explicit terms, merely an "Authentic Interpretation" of the meaning of existing laws. According to *Black's Law Dictionary* (6th Ed. 1990), "Interpretation is '[t]he art or process of discovering and ascertaining the meaning of a statute . . . ,' and '[i]n the civil law, *authentic* interpretation of laws is that given by the legislator himself, which is obligatory on the courts' " (pp. 817-18; emphasis in original). And because an "Authentic Interpretation" of existing laws is simply a statement of the meaning of existing laws, no "retroactivity" problem is presented by such an "interpretation."

There is perhaps a better way of making essentially the same point. In the United States, the legislative branches of the various governments are charged with the responsibility of making laws, and the task of "interpreting" the laws belongs to the judiciary. In civil law countries like Nicaragua, however, as the defendants have insisted, the task of "interpreting" the laws belongs (in theory at least), not to the

judiciary, but to the legislature. An "interpretation" of existing Nicaraguan law by the Nicaraguan National Assembly is therefore the functional equivalent of an "interpretation" of existing federal law by this Court. And if this Court had rendered a decision interpreting an existing federal law, the meaning of which was the subject of a pending motion for rehearing in the court of appeal below, that court would have applied that "interpretation" of the law in an instant, without the first concern about any problem of "retroactivity." *See City of Miami v. Harris, supra.* And because Law No. 157 is the functional equivalent in a civil law jurisdiction of such an "interpretative" decision in a common law jurisdiction, it should have been treated the same way by the court of appeal.

In short, the enactment of Law No. 157 was within the Nicaraguan National Assembly's constitutional authority to "officially interpret the law"; there was simply no "retroactivity" or *ex post facto* problem which would even remotely have been implicated by giving effect to that Interpretative Law in this case while it was pending; and the defendants' effort to excuse the court of appeal's studied refusal to accord any respect whatsoever to Law No. 157 is without merit. Indeed, if the defendants' attempted finesse of Law No. 157 were accepted here, then there would be no branch of the Nicaraguan government which had the authority to "officially interpret the law" in existing cases – and that is plainly not the law.

### 3. The defendants' representations concerning the Nicaraguan Codes and cases are neither fair nor accurate.

Because the relevant provisions of the Nicaraguan Codes are explained with precision and perfect consistency in the Nicaraguan Supreme Court's advisory opinion and the Interpretative Law enacted by the Nicaraguan National Assembly, we saw no need to belabor the details of the underlying provisions in our petition – and we simply referred the Court to the detailed discussion of the relevant code provisions in the plaintiffs' motion for rehearing, at App. 25a-44a. The

defendants have elected to quarrel briefly with the conclusions stated in those documents nevertheless.

For example, the defendants argue that, because Article 2509 of the Nicaraguan Civil Code was derived from Article 1045 of the Civil Code of Costa Rica, the court of appeal correctly "interpreted" Article 2509 to exclude recovery of moral damages, notwithstanding that both the Nicaraguan Supreme Court and the National Assembly plainly stated its meaning to the contrary. If we are given an opportunity to brief the merits of that "interpretation" here, we will demonstrate (as we did in the court of appeal – *see* App. 27a-28a) that the more modern view, adopted by the appellate courts of Costa Rica and touted by current commentators, is that Article 1045 (which has not changed since its enactment, and which itself derives from Article 1382 of the French Code of Napoleon, which authorizes the recovery of moral damages) *does* provide for the recovery of moral damages in Costa Rica – so the defendants' reliance upon Costa Rican law to support the court of appeal's rejection of the Nicaraguan government's interpretation of its own law should ultimately avail the defendants nothing here.

The defendants also argue that, although Article 46 of the Nicaraguan Penal Code plainly authorizes the recovery of moral damages in quasi-criminal (or tort) actions, it does so only upon the criminal conviction of the wrongdoer, and there is no provision in the Nicaraguan Codes providing otherwise. Most respectfully, this is wrong. Article 46 says nothing at all about the need for a criminal conviction or the effect of an acquittal of the tortfeasor on criminal charges.[3] If we are

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[3] Neither does Article 52 of the Penal Code (half of which the defendants have tellingly replaced with an ellipsis in their appendix) say any such thing. On its face, Article 52 says only that civil damages are recoverable from a convicted criminal defendant, and that a request for such damages should be made in a subsequent civil action, rather than in the criminal action. It contains no affirmative prohibition against the recovery of damages in a civil action where there has been no criminal conviction.

given an opportunity to brief the merits here, we will demonstrate (as we did in the court of appeal – *see* App. 32a-44a) that the effect of both convictions and acquittals in criminal proceedings upon subsequent civil suits for damages is explicitly addressed in Articles 2362 and 2363 of the Nicaraguan Civil Code, and in Articles 1122 and 1123 of the Nicaraguan Code of Civil Procedure (all four of which are quoted at App. 33a-34a). And these provisions, as the Nicaraguan National Assembly explained in Law No. 157, authorize (as the law of every jurisdiction in the United States does) the prosecution of a civil tort action against both principal and agent for the recovery of damages, notwithstanding the acquittal of an agent/tortfeasor of criminal charges arising out of the incident. If we are given an opportunity to brief the merits here, we will also provide the Court with three decisions of the Nicaraguan Supreme Court (discussed at App. 35a-42a) which hold exactly that.[4]

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[4] The defendants also argue in footnote 5 of their Brief in Opposition that no judicial decision in the history of Nicaraguan jurisprudence has ever awarded moral damages in a wrongful death case. This statement may be technically accurate, since the parties at least found no such decisions, but the statement is nevertheless purposefully misleading. If we are given an opportunity to brief the merits here, we will provide the Court (as we provided the court of appeal, at pages 22-29 of our answer brief) with three decisions of the Nicaraguan Supreme Court in which moral damages were recovered by *personal injury* plaintiffs under Article 2509 – and, of course, because Article 2509 draws no distinction whatsoever between personal injury and wrongful death cases, these decisions will squarely support our position here. We will also alert the Court to the testimony of the defendants' own expert, who squarely conceded at trial that there is no Nicaraguan Supreme Court decision holding that moral damages are *not* recoverable under Article 2509 or Article 46 (T. 127-28). We will also demonstrate that the sentence quoted in the defendants' footnote is a mistranslation, and does not represent a holding that moral damages are not recoverable under Nicaraguan law; instead, fairly translated and read in context, the sentence is merely an observation that the trial court declined to award the plaintiff moral damages, a ruling which the Supreme Court thereafter declined to overturn because of plaintiff's counsel's failure to raise the issue properly on appeal.

In any event, these details are more properly the subject of a brief on the merits. For our limited purpose here, we continue to insist that the Nicaraguan Supreme Court's advisory opinion and the Nicaraguan National Assembly's Interpretative Law No. 157 should be sufficient by themselves to demonstrate that the court of appeal utterly flouted the authority of the Nicaraguan government, and plainly violated both the plaintiffs' due process rights a..d the act of state doctrine in the process – depriving not merely the plaintiffs, but *scores* of unrepresented Nicaraguan citizens of substantial damage recoveries to which they were plainly entitled under the law of their own nation in at least *34* different wrongful death actions. The decision also provoked an angry response by the Nicaraguan government in the form of a formal diplomatic protest, as well as an amicus brief by that government entreating this Court to grant review, and the decision may therefore imperil continuing friendly relations between the two governments at an exceedingly delicate point in their new relationship.[5] And because the court of appeal wrote its opinion in such a way as to deprive the Florida Supreme Court of any jurisdiction to correct it, and affirmatively refused to certify the case to that Court for further review, the only Court to which it presently owes any accountability at all is this Court. We therefore respectfully urge the Court once

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[5] In a concluding footnote, the defendants assert that the present Attorney General of Nicaragua "apparently has not authorized the filing of an *amicus* brief in this Court." Counsel was engaged for the filing of *amicus* briefs in both the Florida Supreme Court and this Court by the present Attorney General's immediate predecessor-in-office, however, and that authorization was not thereafter withdrawn. That authorization was also recently reaffirmed, after the present Attorney General took office, by Nicaragua's Minister of Foreign Relations (App. 60a-63a). Now that the present Attorney General has been advised of these things, of which he was apparently not informed when the defendants approached him and obtained the certificate included in their appendix, he too has affirmatively "ratified" his predecessor's prior authorization (Supp. App. 1a). Whatever the defendants may have intended to suggest in their concluding footnote is therefore a non-issue here.

again to exercise the supervisory jurisdiction it plainly possesses, and to issue a writ of certiorari to review the court of appeal's incomprehensible decision.

Respectfully submitted,

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Letter issued by Attorney General of Nicaragua (in English Translation) ..... 1a

[TRANSLATION]

OFFICE OF THE SOLICITOR GENERAL

Managua, May 31, 1994

COPY

Dr. Alvaro Ramírez González, President
Nicaraguan Association of Democratic Jurists
Managua

Dear Dr. Ramírez:

In reply to your kind letter of the 28th of this month, I wish to state as follows:

1. The affidavit I signed on May 16th of this year stated very clearly that during my tenure in the position assumed on January 10, 1994 on appointment by her Excellency, Madame President of the Republic, Mrs. Violeta Barrios de Chamorro, I have neither authorized nor delegated any law office, institution or organization, governmental or otherwise, or any individuals or legal entities, to prepare on behalf of, and representation of the Solicitor General's Office of the Republic of Nicaragua, any kind of allegation to be presented or filed with any Court of the United States of America, regarding the TAN/SAHSA aircraft accident that took place on October 21, 1989 in Honduras.

   Once again, I reiterate the terms of this affidavit.

2. I also wish to attest to the fact that there is on file in the archives of the Nicaraguan Solicitor General's office, a motion by the Republic of Nicaragua dated December 8, 1993, by which the previous Solicitor General, Dr. Guillermo Vargas Sandino addressed the Supreme Court of Florida under the title "MOTION OF THE REPUBLIC OF NICARAGUA TO INTERVENE AS A PETITIONER, AND ALTERNATIVE

MOTION TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' POSITION". This motion expresses the official posture of the Government of Nicaragua, which we ratify for all purposes.

I take advantage of this occasion to greet you.

Sincerely,

[ILLEGIBLE SIGNATURE]

Carlos Hernández López
Solicitor General

[STAMP];
SOLICITOR GENERAL
REPUBLIC OF
NICARAGUA

cc: Engineer Antonio Lacayo, Minister of the Presidency
Engineer Ernesto Leal, Minister of Foreign Relations
Dr. José Bernard Pallais, Vice Minister of Foreign Relations

TRANSLATOR'S CERTIFICATION

June 2, 1994

THE UNDERSIGNED HEREBY CERTIFIES:

1. That he is an English-Spanish, Spanish-English Interpreter certified by the U.S. Government to function in the Federal Court system and accredited by the American Translators Association.

2. That the attached translation of

   *AFFIDAVIT OF 5/31/94 BY THE NICARAGUAN SOLICITOR GENERAL,* done for BRUMM, VEGA & ASSOCIATES on this date, from Spanish into the English language, is faithful and accurate to the best of his ability.

Signed: John Todaro
John Todaro
Federally Certified
Interpreter

Sworn to and subscribed before me this 2nd day of June, 1994.

MIREYA VEGA
MY COMMISSION
# CC 374146
(SEAL) EXPIRES:
June 18, 1998
Bonded Thru Notary
Public Underwriters

/s/ Mireya Vega
Mireya Vega
Notary Public, State of
Florida at Large.

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